SECK MUN FOO & 11 ORS.

v.

DATUK HARRIS BIN MOHD. SALLEH

HIGH COURT, LABUAN
DATO' SYED AHMAD IDID J.
[CIVIL SUIT NO. K. 45 OF 1991]
30 DECEMBER 1992

INJUNCTION: Interlocutory injunction restraining defendant from interfering with plaintiffs occupation, enjoyment or use of land - Application to set aside injunction - Whether there are serious issues to be tried - Whether damages adequate remedy - Whether balance of convenience in favour of plaintiffs or defendant.

PRACTICE AND PROCEDURE: Application to strike out claim - Order 18 r. 19 Rules of the High Court 1980 - Whether plain & obvious case.

The plaintiffs are the office bearers of theKelab Golf Labuan. The defendant claimed that he was the owner of the land on which the Kelab Golf had been built and sought to evict the plaintiffs from the premises.

The plaintiffs sought and obtained an interlocutory injunction restraining the defendant from *inter alia* interfering with the plaintiffs' occupation, enjoyment or use of the land on the grounds that the defendant is a bare trustee of the land and they have acquired certain equitable proprietory interests or beneficial ownership in the land.

The defendant applied to set aside the injunction and sought to strike out the plaintiffs' claim.

Held:

[1] Both parties deserve a full hearing and a trial will enable the facts, circumstances and principles to be ventilated, argued and either demolished or substantiated.

[2] There are a number of serious questions to be tried namely, whether the defendant is the owner of the land, whether there was fraud against the plaintiffs, whether there was a completely constituted trust, and the public interest criterion, which can only be answered after the trial.

[3] The Kelab has been occupying and using the land and premises for over a dozen years and deserves some respite to continue its management.

[Defendant's application dismissed with costs]

Cases referred to:

Chung Khiaw Bank v. Tio Chee Hing [1987] 1 CLJ 531 / [1987] 2 MLJ 701 ***(cit)***

Jamir Hassan Bin Najir Hassan v. Kang Min [1991] 3 CLJ 2490 ***(cit)***

Re - Vernazza [1959] 2 All ER 202 ***(refd)***

Oxy Electric Ltd. v. Zainuddin [1991] 1 WLR 115 ***(cit)***

Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors. [1983] 1 MLJ 81 at p. 84 / [1983] 1 CLJ 183 ***(foll)***

Bahr v. Nicholay (No. 2) [1988] 62 AL JR 268 at p. 271 ***(cit)***

Datuk Jagindar Singh & Ors. v. Tara Rajaratnam [1983] 2 MLJ 196 FC ***(cit)***

Assets Company Ltd. v. Mere Roihi & Ors. [1905] AC 176 ***(refd)***

Loi Hieng Chiong v. Kon Tek Shin [1983] 1 MLJ 31 (FC) / [1984] 2 CLJ 88 ***(refd)***

Derry v. Peek [1889] 14 App. Cas. 337 ***(refd)***

Weale v. Ollive 51 ER 1030 ***(refd)***

Milroy v. Lord 45 ER 1185 ***(refd)***

Kwan Teck Meng & Ors. v. Liew Sam Lee [1963] 29 MLJ 333 ***(refd)***

Ex parte PYE (18. Ves. 140) ***(refd)***

Bennet v. Bennet 10 Ch. D. 477 ***(refd)***

Richards v. Delbridge [1874] Vol. 18 LR Equity p. 11 ***(refd)***

Jasbir Kaur & Anor. v. Tharumber Singh [1974] 1 MLJ 244 ***(refd)***

Borneo Housing Mortgage Finance Bhd. v. Bank Bumiputra Malaysia Bhd. [1991] 2 CLJ 1497 / [1991] 2 MLJ 261 ***(refd)***

Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor [1984] 2 MLJ 105 FC, p. 109 / [1984] 2 CLJ 88 ***(refd)***

Mooney v. Peat Marwick & Mitchell [1967] 1 MLJ 87 ***(refd)***

Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong [1970] AC 1136 ***(refd)***

Veetak Enterprise Sdn. Bhd. v. The Kuala Lumpur Finance Bhd. [1987] 1 MLJ 407 ***(refd)***

Associated Newspapers Group v. Insert Media [1988] 1 WLR 509 ***(refd)***

American Cyanamid Co. Ltd. v. Ethicon Ltd. [1975] AC 396 ***(refd)***

Unigate Dairies Ltd. v. Bruce [1988] The Times, March 2 ***(refd)***

Lian Keow Sdn. Bhd. & Anor. v. Overseas Credit Finance (M) Bhd. & Ors. [1982] 2 CLJ 350 / [1982] 2 MLJ 162 FC ***(refd)***

Dunhill (Alfred) Ltd. v. Sunoptics S.A. [1979] FSR 377 at 476 ***(refd)***

Cayne v. Global Natural Resources PLC [1984] 1 All ER 225 ***(refd)***

Lim Khoo Eong v. Trustees of Leong San Tong Khoo Kongsi (Penang) Regd. & 2 Ors. [1987] 2 MLJ 621 ***(refd)***

Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 (PC) at 215 ***(refd)***

Hubbard v. Vosper [1972] 2 QB 84 ***(refd)***.

Cheah Theam Swee & Anor. v. Overseas Union Bank Ltd. & Ors. [1989] 1 MLJ 426 / [1989] 1 CLJ 157 ***(refd)***

Columbia Picture Industries Inc. v. Robinson [1987] Ch 38 ***(refd)***
Graham v. Campbell [1878] 7 Ch.D. 490 ***(refd)***
Attorney-General v. Albany Hotel Co. [1896] 2 Ch 696 ***(refd)***
Rigby v. Great Western Railway Co. [1849] 2 Ph 44 at 50 ***(refd)***
Rochdale B.C. v. Anders [1983] 3 All ER 490 ***(refd)***
Barclays Bank Ltd. v. Rosenborg [1985] 135 New LJ 633 ***(refd)***
Allen v. Jambo Holdings Ltd. [1980] 1 WLR 1252 CA ***(refd)***
Cheo Lean Low v. Fook Fong Looi [1985] 2 MLJ 440 ***(refd)***
Paruvathy d/o Murugiah v. Krishnan s/o Doraisamy [1983] 2 MLJ 121 FC ***(refd)***
Othman & Anor. v. Mek [1972] 2 MLJ 158 FC ***(refd)***
Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors. [1988] 2 MLJ 449 SC ***(refd)***
Wilkins & Ors. v. Kannammal & Ors. [1951] MLJ 99 ***(refd)***
Registrar of Titles, Johore v. Temenggong Securities Ltd. [1976] 2 MLJ 44 ***(refd)***
Oh Hiam & Ors. v. Tham Kong [1980] 2 MLJ 159 ***(refd)***
Ng Tien & Anor. v. Chow Nim Yang [1990] 3 MLJ 373 SC/[1990] 2 CLJ 937 ***(refd)***
Megaphone International Ltd. v. British Telecommunications Ltd. [1989] The Independent, March 1 ***(refd)***
C.B.S. Songs v. Amstrad Consumer Electronics [1988] AC 1013 ***(refd)***
Evans Marshall v. Bertola [1973] 1 WLR 349 ***(refd)***
Si Rusa Beach Resort Sdn. Bhd. v. Asia Pacific Hotels Management Pte Ltd. [1985] 1 MLJ 132 FC/[1984] 2 CLJ 13 ***(refd)***
Wea Records Ltd. v. Visions Channel 4 [1983] 1 WLR 721 ***(refd)***
Ocean Software Ltd. v. Kay & Ors. The Times Law Report of 29 January 1992 ***(refd)***

Legislation referred to:
Societies Act 1966, s. 9(c)
Civil Law Act 1956, s. 28
Rules of the High Court 1980, O. 18 r. 19

Other sources referred to:
GIFT - "It's all Yours" Ineffective [1963] MLJ lxxx.

For respondents/plaintiffs - C.V. Dass (Robin Ch'ng and Sandhu with him); M/s. Robin Ch'ng & Co.
For the applicant/defendant - G. Sri Ram (Colin Lau with him); M/s. Colin Lau & Co.

JUDGMENT

Syed Ahmad Idid J:
Will the island of Wilayah Persekutuan Labuan have a Golf Course come the New Year 1993? Can the Kelab Golf Labuan (The Kelab) continue to have the "legal, equitable and beneficial interests" in the 74.68 acres on which the club complex stand? The Court is asked by the defendant to strike out the plaintiffs' claims to the above interests and to set aside the Court order, i.e. an injunction which restrains the defendant from interfering with the plaintiffs' "occupation, enjoyment or use" of the land.

The Kelab's Legal Adviser had opined that "Datuk (or defendant) has a right to take a Court order to evict the Club members but an injunction can be taken to protect us and this matter will take a long time to sort out." Accordingly, the Kelab applied for an injunction on 11 March 1991. This was granted two days later on 13 March 1991. If the Court holds that the defendant is entitled to the land, then plaintiffs will face eviction and they will be turned away from the Club premises. Defendant will take the land and either develop it or, from what he says in his letters, sell it. Defendant (Datuk Harris) as shareholder with 3,425,000 shares/director of Sejati Sdn. Bhd. sold land in Kiansam in May 1992 to Pesuruhjaya Tanah Persekutuan for $48,508,415.31.

The original plaintiffs, as listed above, were the incumbent office-bearers of the Kelab Golf Labuan. Since 20 August 1991, with leave of the Court, Seck Mun Foo, the incumbent President, remains as plaintiff as he is the public officer of the Kelab. He continues this action for and on behalf of the Kelab pursuant to s. 9(c) of the Societies Act 1966. According to the amended statement of claim, the "members presently (at 20 August 1991) number more than 600 members". Defendant's letter to "All members of the Club". (See plaintiff's Exhibit S-38), stated that "The present membership (at 18 February 1991) of 540 members be increased to 600 members". But the plaintiff's fourth affidavit claims that the Kelab "now (on 28 September 1992) has 1,184 members using the Kelab's facilities".

The Kelab was able to attract less than 600 members for period between 1977 and 1989 (or 12 years). Then suddenly from 1990 (presumably just before or after (or at) the institution of this action, the membership increased by 100%. Is this indicative that the Club comes to Court with clean hands? - especially when the Club is asking for *status quo* to be preserved. Perhaps some adviser may have suggested to

the Kelab that the quantity (of members) will tilt justice in their favour? The plaintiff did not keep the *status quo.* This shows bad faith on their part. I should think that whatever advantages or damages should the case go against the Kelab will be on the heads of those who were on the membership active list just at the time this action was instituted. On that I shall not think too much of striking out the writ merely on this point.

The proceedings over two days on 6 and 7 October 1992 adequately touched on the numerous matters which both senior Counsel considered as relevant and in their clients' best interests.

Defendant's Submission:

Is there an abuse of the process? *Chung Khiaw Bank v. Tio Chee Hing* [1987] 2 MLJ 701. In that case and in *Jamir Hassan Bin Najir Hassan v. Kang Min* [1991] 3 CLJ 2490 the parties at fault took several actions. This is not so in our instant case. I cannot accept Mr. Sri Ram's contention as I am of the opinion the Kelab did not bring this matter to Court to "delay the execution of the judgment in the earlier action". There is no earlier action on this.

I agree with Lord Parker CJ in *Re - Vernazza* [1959] 2 All ER 202 in that the Court must look at the whole history of the matter, and this is what I shall do in the following areas:

The Land: Ownership? In Whose Possession?:

Defendant claims to be owner and registered proprietor of the Suburban Town Grant 412 after he acquired it from a third party (Yap Hyun Phen) for RM719,270 on 9 March 1972 and registered it on the same day. He says the land now in dispute consists of Grant 412 and three other parcels SL.331, 332 and 333. The exhibit HS-3 to defendant's affidavit affirmed on 30 March 1991, describes the "owner" of the Town Lease 207512589 as holder of NRIC H0000022 whereas the Exhibit S-17, an undated and unstamped transfer executed by defendant in favour of the plaintiffs, gives his NRIC number as H0000008. Can the holders of two different NRICs be the same person? The notes to the Kelab Account as at 31 December 1983 and 1984 state that:

> the land on which the golf course and building are situated is not the club's property and no sub-lease agreement between the landowner and the club has been executed and hence no amortization of land is provided.

The notes to the Accounts at 31 December 1982 under "Donations Received" refers to "proceeds amounting to RM33,759 from the sale of land adjoining the Club which is given to the Club as donation by Y.A.B. Ketua Menteri, Datuk Harris bin Mohd. Salleh". Exhibit "HS-5A". Exhibit SMF-2, which is S-17 but with more details, e.g.

(i) the consideration was for Ringgit NIL;
(ii) the President (Maurice John Perry), Secretary (Hillary Koh Chean Kan) and Treasurer (Richard Wong Su Khyun) signed; and
(iii) all three stated that they accepted this transfer in the terms "herein stated".

SMF-3 shows that the President of the Kelab enclosed the original title deed, transfer documents and Kelab Constitution and instructed Messrs, Skinner Lind Robertson Pang & Willie (or Messrs. Skinner) to prepare the necessary documentation for transfer of the land to the Kelab on 23 March 1984.

An investigation was conducted in March and May 1984 because a Member of Parliament had alleged that defendant (in this action) "owned 70% of the lands in Labuan". Defendant then replied that he owned only "not more than 2% of the land on the island". On p. 36 of the Report of Proceedings in the Dewan Rakyat, defendant states: "Saya mengaku nama saya, saya mahu rekodkan disini Title 207521589 seluas 74.68 ekar ialah Golf Course yang mana saya mesti mempunyai nama disitu. Itu rekod sahaja. Golf Course sudah dipakai disitu 8 tahun. Golf Course sudah di-buat, kepunyaan Golf Club. Mereka beri nama saya menjaga kerana takut gaduh-gaduh". The Management Committee of the Kelab met on 31 October 1990 "to discuss the Club land which is owned by Datuk" (or defendant). The club complex comprises a club-house, swimming pool, squash and tennis courts and all ancillary buildings together with a 9-hole golf course. The Notes to the Accounts for year ended 1988 - HS-5D - describes the Club's fixed assets as Swimming Pool and Building (RM719,415), Clubhouse and Course (RM508,268), Furniture and Equipment (RM381,386) and other odd items and at the bottom it states "The Club premises are built on a piece of land belonging to a third

party". This is repeated in HS-5E for year ended 31 December 1989. Plaintiffs claim that they have acquired certain equitable proprietary interests or beneficial ownership in the land. They do not claim rights as registered proprietor and they seek the Court's protection until trial.

Why Did The Kelab Not Register The Land In Its Name?

Messrs. Skinner (See Exhibit S-18) on 9 August 1984 applied to Ketua Setiausaha Perbendaharaan for stamp duty exemption on "behalf of Trustees of the Labuan Golf Club ... the transferor is the sole registered owner. The registered owner holds this property on trust ... it is his intention to transfer it into names of trustees ... on condition the Club is conducted on a non-profit basis". Messrs. Skinner wrote S-19 to Perbendaharaan on 6 September 1984 enclosing original Memorandum of Transfer "signed by both parties", followed by a reminder S-20 dated 23 October 1984. Messrs. Skinner returned the title deed and copies of the memorandum of transfer in S-21 to defendant on 30 July 1985 ... that letter was copied to the Kelab, S-22. Defendant wrote to Club President on 2 August 1986 giving ultimatum: that if (the matter of stamp duty, legal fees, transfer) are not resolved within three months, the transfer would be deemed unworkable and henceforth cancelled. He wrote again on 3 September and copied to solicitors. Only on 23 October 1986 at "critical stage" did the Club write to Y.A.B. Timbalan Perdana Menteri. Mr. Roger C.S. Tay, then President, acknowledged in that letter that the Golf Club was built on "land belonging to Datuk Harris Mohd. Salleh" (the defendant). Then the defendant sent HS-4 on 28 November 1986 claiming that the three months "expired on 2 November 1986" and so "the transfer is therefore unworkable and cancelled". Defendant then offered the Club a lease of 25 years instead. The letter at S-25 on 13 April 1989 attempted to "formalise the use" (of the Club) by giving several conditions. This was followed by several meetings. Neither side was prepared to meet the requirements of the other. (Pages 68 to 83 of plaintiffs' exhibits). Because the Kelab was not able to pay the stamp duty, can the plaintiffs be described as a "self-confessed impecunious litigant"? see *Oxy Electric Ltd. v. Zainuddin* [1991] 1 WLR 115. Defendant asserted himself as an absolute owner over the property in February 1991. He then caused to be planted within the Kelab compound a Notice Board entitled "New Private Golf Course" - See p. 130 S-40 - where a day previously Sabah Times printed "For the Information of Golfers" stating that Dr. Sulong Junaidi and Kuraman Resort Sdn. Bhd. would begin to operate the 9-hole Golf Course as a private golf course "as and when the Labuan Golf Club has vacated the premises".

Plaintiffs explained that they did not know of the intended transfer because they have different committees. It seems to me this is not a prudent way of doing business or running and managing a society. Surely each subcommittee reports to the main committee. There are permanent records which members can refer to. In addition, is not plaintiff No. 12 the secretary who signed SMF-2? If this is so, then the defendant's proposals from 1986 to February 1991 cannot be tainted by fraud and defendant was not taking advantage of Committee's ignorance. It is helpful that Abdul Hamid FJ, as His Lordship Tun LP then was, said in *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] 1 MLJ 81 at p. 84:

> ... the question of fraud is one of fact to be determined in the light of the facts and circumstances surrounding each particular case. The onus is upon the person alleging fraud to prove fraud not on a balance of probabilities but beyond reasonable doubt (see *Saminathan v. Pappa* [1981] 1 MLJ 121 at p. 123 citing *Narayanan v. Official Assignee, Rangoon* AIR [1941] PC 93).

Did The Kelab Or Anyone Else Expend Money On The Premises And Facilities?

Those who read S-29 will know that "the Club has expended money". But S-31 changed this to "the Sabah Government in 1972 expended money in the construction of a nine-hole golf course and other sporting and recreational facilities on the said land". S-31 was by defendant but he has not provided any proof. In the Minutes of the Management Committee Emergency Meeting held on 28 January 1991, it was noted that "a third party i.e. the Sabah State Government would be involved in this matter since they have expended money in the construction of the golf course". Then defendant on 1 February 1991, said that such statement was not true and he corrected by stating:

> No Government funds were budgeted nor expended for the construction of the golf course

which was constructed through the good gesture of a timber company.

According to Exhibit S-10 - letter from Raja dan Gabongan copied to both the plaintiffs and the defendant (then Ketua Menteri, Sabah) on 4 March 1977, it was (Sabah) "Government who spent RM4 million to fund the construction of the golf course ...". Defendant is said to wear many hats - as proprietor of land, State Co-ordinator for Development of Golf Courses, 1976-1986 his dealing with Club was as Chief Minister of Sabah and 1977 until recently as trustee of the Kelab. As Chief Minister, he approved in one instance RM116,000 (see exhibit S-14). On the other hand the plaintiffs claim that they and, on their behest, others expended money to construct the premises. Defendant disputes this. What is the consequence of a third party and not plaintiffs making improvements? I shall disregard s. 28 of the Civil Law Act 1956 in view of the arguments by plaintiffs against its applicability. Can the issue of proprietary estoppel succeed?

Plaintiffs' Case:

According to the plaintiffs, defendant is a bare trustee of the land and therefore has no legal or equitable rights. Plaintiffs also advanced the second of two-prong attack, that is, fraud on defendant's part and provided particulars of fraud in para. 22(2)(i) to (iv) of the Amended Statement of Claim. If the Court holds that there was a sale of the land to Syarikat Berdikari in 1972, then what took place thereafter between defendant and plaintiffs may amount to deception or lack of candour on the part of the former. According to the decision in *Bahr v. Nicholay (No. 2)* [1988] 62 AL JR 268 at p. 271 actual fraud, personal dishonesty or moral turpitude lie at the heart. Plaintiffs claim that all the interest of the Syarikat annures to the Kelab. Is there sufficient proof of fraud at this stage? *Datuk Jagindar Singh & Ors. v. Tara Rajaratnam* [1983] 2 MLJ 196 FC states that the Privy Council has made it clear in *Assets Company Ltd. v. Mere Roihi & Ors.* [1905] AC 176 that "fraud" in the Torrens System means "actual fraud" and not "constructive or equitable fraud". Fraudulent misrepresentation is fraud (see p. 202). *Loi Hieng Chiong v. Kon Tek Shin* [1983] 1 MLJ 31 (FC) cited *Derry v. Peek* [1889] 14 App. Cas 337. Is there dishonesty on the part of the defendant? Additionally, the plaintiffs also say that the defendant has expressly and impliedly promised and held out to the plaintiffs that he would make a gift of the land to them.

Propositions of Law:

(1) To be enforceable by a volunteer, a trust or gift of property must be completely constituted. This Court will not assist a volunteer by making effectual an incomplete gift. *Weale v. Ollive* 51 ER 1030. See also *Milroy v. Lord* 45 ER 1185 and *Kwan Teck Meng & Ors. v. Liew Sam Lee* [1963] 29 MLJ 333. Defendant wishes me to follow Gill J's interpretation of the Contracts Ordinance (at p. 337): "in that a transfer by way of gift is void until it is registered". The Court went on to say that "It follows therefore that in the case of a transfer of land the transferee as from the date of the transfer becomes the beneficial owner of the land although the legal title will not vest in him until the transfer is duly registered". The defendant wishes the Court to hold that the SMF-2 is not a registrable instrument until the stamp duty has been paid and that it was a failed gift. See **GIFT** - "It's all Yours" Ineffective [1963] MLJ lxxx.

Learned Counsel for the defendant contests vigorously that it was not the responsibility of the defendant (as transferor) to pay the stamp duty and conveyancing expenses. We can understand this as both parties are "strangers" and not in *loco parentis*. See Lord Eldon in *Ex parte PYE* (18 Ves. 140) and Jessel M.R. in *Bennet v. Bennet* 10 Ch. D. 477. See amended statement of defence p. 4 para. 1(n) and (p).

(2) Equity will not construe as a declaration of trust an ineffectual attempt to make a gift. Who says defendant was holding the land on trust? Messrs. Skinner's letters. If the Court finds elements of fraud or factors which show it was unconscionable for the defendant to resile from his promises made over 16 years, the Court can find a constructive trusteeship. See *Richards v. Delbridge* [1874] Vol. 18 LR Equity p. 11, Sir Jessel MR ... the "trustee" must constitute himself a trustee and may so deal with the property as to deprive himself of its beneficial ownership and declare to the

equivalent that "I declare myself a trustee". This may appear to be the case but then registered rights can override equitable interests and such questions need to be ventilated beyond all doubts.

(3) That a fully constituted trust or gift to a volunteer only comes about if the transferor has done all that is required of him by law to pass good title and place in the hands of the donee or its solicitors the instrument for registration in a state where registration is possible. In *Jasbir Kaur & Anor. v. Tharumber Singh* [1974] 1 MLJ 224 FC, Azmi, then LP, held the view (at p. 228) that the memorandum of transfer executed by the plaintiff before its registration had not effectually transferred the land to the first defendant. This was similarly held in *Borneo Housing Mortgage Finance Bhd. v. Bank Bumiputra Malaysia Bhd.* [1991] 2 MLJ 261 where it was held that "A registered owner by executing a memorandum of transfer or upon receipt of the purchase price in full had divested himself of all beneficial interest in the land and vested it in the *bona fide* purchaser. The registered owner becomes a bare trustee for the purchaser". The Court was dealing with a sale where money had passed in the latter case.

Questions I must ask are: whether transfer (to Kelab) executed by defendant in 1984 was a free act and independent of any other considerations, e.g. was it pursuant to any understanding with **Berdikari** and/or State Government of Sabah?

Was there a sale by defendant to Syarikat Berdikari? If so, can defendant be treated as a bare trustee? Additionally, there are other questions regarding the State Government having approved timber land to the timber company and did the company buy defendant's land specifically for the golf course? See Syarikat's letter to defendant (S-5) and plaintiffs' exhibit MD-1 and letter from defendant to Syarikat Berdikari dated 11 October 1990. Both directors of Syarikat Berdikari Sdn. Bhd. claim the land belongs to their company and that they had bought it from defendant. Why did not defendant disclose that land had been sold to Berdikari when he dealt with Club Committee in 1990? Did he attempt to obtain an agreement on concealment (of fact) and was it therefore a deception? Court has to make a finding on the serious questions of fact and of law.

What Court Has To Decide?:

If the plaintiffs cannot establish their title, legal or beneficial, then no serious question arises in which case the injunction cannot be sustained and so it must be struck out. What really is the nature of the application and the Court's powers?

In *Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor* [1984] 2 MLJ 105 FC, Wan Suleiman FJ said (at p. 109) that: "so long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out". See *Mooney v. Peat Marwick & Mitchell* [1967] 1 MLJ 87. See also Privy Council decision in *Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong* [1970] AC 1136. The Court can, however, exercise the summary power under O. 18, r. 19 in "plain and obvious cases".

This was followed in *Veetak Enterprise Sdn. Bhd. v. The Kuala Lumpur Finance Bhd.* [1987] 1 MLJ 407 which held that "it is not permissible to try the action on affidavits when the facts and issues are in dispute". It is common knowledge that an injunction must support a legal right. *Associated Newspapers Group v. Insert Media* [1988] 1 WLR 509. Interlocutory injunctions are targeted at preserving *status quo* if factors are equally balanced. See *American Cyanamid Co. Ltd. v. Ethicon Ltd.* [1975] AC 396 and so a grant of an interlocutory injunction is a remedy that is both temporary and discretionary. The position to be maintained is that as it had been before the alleged breaches began, not as at the date of hearing. *Unigate Dairies Ltd. v. Bruce* [1988] The Times, March 2. *Lian Keow Sdn. Bhd. & Anor. v. Overseas Credit Finance (M) Bhd. & Ors.* [1982] 2 MLJ 162 FC. Defendant's failure to disclose can strengthen plaintiff's hand. *Dunhill (Alfred) Ltd. v. Sunoptics S.A.* [1979] FSR 337 at 476. The question of balance of convenience means balance of risks of doing an injustice. *Cayne v. Global Natural Resources PLC* [1984] 1 All ER 225.

How Decisive Is The Undertaking?:

Should the injunction go because the undertaking as to damages is worthless or just because in this case the plaintiffs could not pay the stamp duty?

In *Lim Khoo Eong v. Trustees of Leong San Tong Khoo Kongsi (Penang) Regd. & 2 Ors.* [1987] 2 MLJ 621 the Judge said that it is acceptable " ... in special circumstances". In the instant case the Court granted the injunction "subject to undertaking as to damaged" and similar to *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 (PC) at 215 "... the plaintiff would be in a position to satisfy his undertaking as to damages". It is accepted that the Court retains overriding discretion. *Hubbard v. Vosper* [1972] 2 QB 84.

In *Cheah Theam Swee & Anor. v. Overseas Union Bank Ltd. & Ors.* [1989] 1 MLJ 426, Shanker J. said, with which I agree, that "a bare undertaking as to damages may be unusual as to form but useless as to the content". Nevertheless, I accept that plaintiffs' position in 1992 is different from that in 1977 or even in 1984. But the plaintiffs must bear in mind that should the case go against them that damages can be aggravated - *Columbia Picture Industries Inc. v. Robinson* [1987] Ch 38.

I have also considered the opposite views in:-

(i) While it is true that an undertaking as to damages "ought to be given on every interlocutory injunction (see *Graham v. Campbell* [1878] 7 Ch.D. 490), the Court held that "the better view is that in special circumstances this may be either unnecessary or inappropriate". See *Attorney-General v. Albany Hotel Co.* [1896] 2 Ch 696.

(ii) The undertaking as to damages is indeed a hedge against the Court getting it wrong. *Rigby v. Great Western Railway Co.* [1849] 2 Ph 44 at 50 and is designed as far as possible to compensate the other party. *Rochdale B.C. v. Anders* [1983] 3 All ER 490.

The Court may order the plaintiffs to fortify their undertaking by providing security. This is on the probability that the undertaking may be enforceable if it is established after trial, by defendant, that injunction should not have been granted. *Barclays Bank Ltd. v. Rosenborg* [1985] 135 New LJ 633. The Court will not make any order on this occasion as the Kelab is non profit-making in that any surplus over expenditure is not distributed to members nor is it putting the land to commercial use. See *Allen v. Jambo Holdings Ltd.* [1980] 1 WLR 1252 CA; *Barclays Bank Ltd. v. Rosenberg* [1985] 135 New LJ 633.

I have also considered the following cases in arriving at the conclusion that both parties deserve a full hearing and a trial will enable the facts, circumstances and principles to be ventilated, argued and either demolished or substantiated:-

Cheo Lean Low v. Fook Fong Looi [1985] 2 MLJ 440;
Paruvathu d/o Murugiah v. Krishnan s/o Doraisamy [1983] 2 MLJ 121 FC;
Section 88, Sabah land Ordinance;
Othman & Anor. v. Mek [1972] 2 MLJ 158 FC;
Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors. [1988] 2 MLJ 449 SC;
Wilkins & Ors. v. Kannammal & Ors. [1951] MLJ 99;
Registrar of Titles, Johore v. Temenggong Securities Ltd. [1976] 2 MLJ 44;
Oh Hiam & Ors. v. Tham Kong [1980] 2 MLJ 159;
Ng Tien & Anor. v. Chow Nim Yang [1990] 3 MLJ 373 SC.

On the basis of the materials before me, I am satisfied that there are a number of serious questions to be tried in the suit, one of which is the public interest criterion. *Megaphone International Ltd. v. British Telecommunications Ltd.* [1989] The Independent, March 1. This is not a plain and obvious case. My discretion is also guided by such flexible criteria as:

(a) Is there a serious issue to be tried? Yes. Both parties claim for the same piece of land. *C.B.S. Songs v. Amstrad Consumer Electronics* [1988] AC 1013.
(b) Are damages an adequate remedy? A party's ability to pay may be relevant but such ability to pay is not a rich man's charter. *Evans Marshall v. Bertola* [1973] 1 WLR 349; and
(c) Where does the balance of convenience

lie? In *Si Rusa Beach Resort Sdn. Bhd. v. Asia Pacific Hotels Management Pte Ltd.* [1985] 1 MLJ 132 FC, Abdul Hamid CJ Malaya (as His Lordship Tun LP then was) held in that case that "if the *status quo* is to be maintained, the only order that could properly be made is to allow the appellants to continue to run the hotel until the action is finally litigated and a decision made thereof".

(d) A valuable analysis of the manner in which an *exparte* order ought to be challenged was given by Sir John Donaldson MR, in *Wea Records Ltd. v. Visions Channel 4* [1983] 1 WLR 721. See *Ocean Software Ltd. v. Kay & Ors.* The Times Law Report of 29 January 1992

I can only conclude that the Kelab deserves some respite to continue its management. At this juncture the decision is merely to allow the Kelab to run its activities and use the land until a binding judgment can be made after the claims are tried. Both parties will again have their say, next time with evidence from witnesses and through documents. As the price of the land in Labuan jumps up dramatically by leaps and bounds so can we expect the parties to contest vigorously with all the armour and ammunition and ingenuity.

The Kelab has been occupying and using the land and premises for over a dozen years; the defendant has told Parliament that he is only a trustee and not owner of the land. If the "owner" holds NRIC No: 0000022, then who was it holding NRIC No: 0000008 who signed the transfer forms? If defendant is no longer the owner, who is? Several doubts remain uncleared and many questions of law remain unanswered. In the premises, I dismiss the defendant's application with costs.

TAMPARULI GRANITE QUARRY (SABAH) SDN. BHD. & ANOR.

v.

DAVID FUNG YIN KEE (PRACTISING UNDER THE NAME AND STYLE OF MESSRS. DAVID FUNG & CO. ADVOCATES & SOLICITORS)

HIGH COURT, KOTA KINABALU
DATO' SYED AHMAD IDID J.
[CIVIL SUIT NO. K. 285 OF 1989]
18 DECEMBER 1992

PRACTICE AND PROCEDURE: Claim against solicitor based on negligence - Plaintiff making application for summary judgment - Whether defendant has shown defence on the merits - Whether there are triable issues.

The plaintiffs' appointed the defendant to act for them in various civil suits. The suits were dismissed and the plaintiffs' claim that they instructed the defendant to undertake the appeals to the Supreme Court. The appeal documents were filed and/or served out of time and consequently the appeals were dismissed.

The plaintiffs' then sued the defendant for negligence and took out summary judgment proceedings under O. 14 Rules of the High Court 1980.

Held:

[1] There are questions involving serious legal examination that only a trial can determine and resolve.

[2] The defendant has raised triable issues. Considering all the claims defences and legal principles, this was not a proper case for the grant of summary judgment.

[Plaintiffs' application dismissed with costs]

Cases referred to:

Gill v. Lougher [1830] 1 Cr. & J. 170 ***(foll)***
Griffiths v. Evans [1953] 2 All ER 1364 ***(refd)***
Rondel v. Worsley [1966] 3 All ER 657 ***(refd)***
Miranda v. Khoo Yew Boon [1968] 1 MLJ 161 ***(refd)***
Kitchen v. Royal Air Forces Association [1958] 2 All ER 241 ***(refd)***
Bolam v. Friern Hospital Management Committee [1957] 2 All ER 112 ***(refd)***
Dummer v. Brown [1953] 1 QBD 710 ***(not foll)***
Avel Consultants Sdn. Bhd. & Anor. v. Mohamed Zain Yusof & Ors. [1985] 2 MLJ 209 / [1985] 2 CLJ 11 ***(dist)***
Bank Negara Malaysia v. Mohd Ismail bin Ali Johor & 2 Ors. [1992] 1 MLJ 400 / [1992] 1 CLJ 653 ***(dist)***